

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

BRENDA WING,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

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APPELLANT'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR .....	1
B. SUPPLEMENTAL ISSUE.....	1
C. ARGUMENT .....	1
In violation of due process, Ms. Wing’s guilty plea is involuntary because it was based on incorrect calculations as to her offender score and standard range on count two. She should be permitted to withdraw her plea.....	1
D. CONCLUSION .....	6

## TABLE OF AUTHORITIES

### **Washington Supreme Court Cases**

<u>In re Bradley</u> , 165 Wn.2d 934, 205 P.3d 123 (2009).....	5
<u>In re Pers. Restraint of Isadore</u> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	2
<u>State v. A.N.J.</u> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	2
<u>State v. Bisson</u> , 156 Wn.2d 507, 130 P.3d 820 (2006).....	5
<u>State v. Codiga</u> , 162 Wn.2d 912, 175 P.3d 1082 (2008) .....	2
<u>State v. Mendoza</u> , 157 Wn.2d 582, 141 P.3d 49 (2006) .....	2, 3
<u>State v. Turley</u> , 149 Wn.2d 395, 69 P.3d 338 (2003) .....	5

### **Washington Court of Appeals Cases**

<u>Crosswhite v. Washington State Dep't of Soc. &amp; Health Servs.</u> , No. 33718-9-III, 2017 WL 169089, at *1 (Wash. Ct. App. Jan. 17, 2017) .....	4
<u>State v. Wing</u> , No. 48143-0-II, slip. op. (Wash. Ct. App. Feb. 28, 2017) (unpublished) .....	4, 5

### **Constitutional Provisions**

Const. art. I, § 3 .....	2
U.S. Const. amend. XIV .....	2

### **Statutes**

RCW 9.94A.030(34).....	3
RCW 9.94A.030(55).....	3
RCW 9.94A.510.....	3
RCW 9.94A.515.....	3
RCW 9.94A.525.....	3

RCW 9.94A.525(1).....	3
RCW 9.94A.525(7).....	3
RCW 9.94A.589(1)(a) .....	3
RCW 9A.36.140.....	2
RCW 9A.36.140(2).....	3

### **Rules**

CrR 4.2(d) .....	2
GR 14.1 .....	4

## **A. SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. In violation of due process as guaranteed by the Fourteenth Amendment to the United States Constitution and article I, § 3 of the Washington Constitution, Ms. Wing's guilty plea was involuntary.

2. Ms. Wing's guilty plea was premised on incorrect calculations as to her offender score and standard range for assault of a child in the third degree (count two).

## **B. SUPPLEMENTAL ISSUE**

When a defendant is misinformed as to a sentence for an offense in an indivisible plea agreement, the plea is involuntary and due process entitles the defendant to withdraw the entire guilty plea. As part of an indivisible plea agreement, Ms. Wing was misinformed as to the consequences of pleading guilty as to count two. Her offender score on this count was miscalculated as a "6" rather than a "5," resulting in a wrong standard range. Was Ms. Wing's guilty plea involuntary?

## **C. ARGUMENT**

**In violation of due process, Ms. Wing's guilty plea is involuntary because it was based on incorrect calculations as to her offender score and standard range on count two. She should be permitted to withdraw her plea.**

Constitutional due process requires that a defendant's guilty plea be knowing, voluntary, and intelligent. In re Pers. Restraint of Isadore,

151 Wn.2d 294, 297, 88 P.3d 390 (2004); U.S. Const. amend. XIV; Const. art. I, § 3. Under the court rules, a plea must be “made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Before a guilty plea is accepted, the defendant must be informed of all the direct consequences. State v. A.N.J., 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010). One direct consequence is the length of a sentence. State v. Mendoza, 157 Wn.2d 582, 590, 141 P.3d 49 (2006).

A defendant may be allowed to withdraw her guilty plea ““whenever it appears that withdrawal is necessary to correct a manifest injustice.”” State v. Codiga, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008) (quoting CrR 4.2(f)). “An involuntary plea can amount to manifest injustice.” Id. at 923.

In this case, Brenda Wing pleaded guilty to six felony counts, including assault of a child in the third degree (count two), RCW 9A.36.140. CP 16, 27; 5/7/15RP 6-9. The guilty plea was premised on Ms. Wing’s understanding that her offender score on this count was a “6” and that her standard range would be 22 to 29 months. CP 20; 5/7/15RP 4. The court also accepted these calculations, as the judgment and sentence shows. CP 178.

These calculations, however, were incorrect. Correctly calculated, Ms. Wing's offender score on count two was a "5," not a "6," and the resulting standard range was 17 to 22 months, not 22 to 29 months.

An offender score is calculated by counting prior and current felony convictions consistent with RCW 9.94A.525. Current felony offenses are counted as if they were prior offenses when scoring the other crimes being sentenced. RCW 9.94A.525(1); RCW 9.94A.589(1)(a).

Assault of a child in the third degree is a class C felony with a seriousness level of three. RCW 9A.36.140(2); RCW 9.94A.515. It is a "nonviolent offense." RCW 9.94A.030(34), (55). Accordingly, each adult prior felony conviction is counted as one point. RCW 9.94A.525(7).

Ms. Wing had no prior convictions. 5/7/15RP 5. She pleaded guilty to five other felony offenses. CP 15-18, 27; 5/7/15RP 5-9. This makes her offender score on count two a "5." Because this offense has a seriousness level of three, the standard range is 17 to 22 months. RCW 9.94A.510.

Because Ms. Wing's guilty plea was based on incorrect calculations as to her offender score and standard range, her plea was involuntary. This misinformation resulted a higher standard range. Accordingly, Ms. Wing is entitled to withdraw the plea based on involuntariness. Mendoza, 157 Wn.2d at 591.

This Court recently resolved an identical issue in this manner. State v. Wing, No. 48143-0-II, slip. op. (Wash. Ct. App. Feb. 28, 2017)<sup>1</sup> (unpublished).<sup>2</sup> Wing involved the prosecution of Ms. Wing’s husband, Danny Wing, for the death of J. Like this case, Danny<sup>3</sup> pleaded guilty to first degree manslaughter and third degree assault of a child. Slip. op. at 1. He had four prior felony convictions. Slip. op. at 8. However, his offender score on the assault of a child offense was miscalculated as a “6” when it should have been a “5.” Slip. op. at 8. The resulting standard range for this offense was also improperly calculated at 22 to 29 months. Slip. op. at 8. Because Danny’s guilty plea was premised on these miscalculations, this Court held he must be permitted to withdraw his plea. Slip. op. at 8-10.

The State conceded the error, but argued there was no manifest injustice because Danny’s ultimate sentence was not affected and speculated that Danny would have pleaded guilty even if he had been properly informed. Slip. op. at 9. Like Ms. Wing, the trial court

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<sup>1</sup> Available at <https://www.courts.wa.gov/opinions/pdf/D2%2048143-0-II%20Unpublished%20Opinion.pdf>.

<sup>2</sup> Recent unpublished opinions may be cited as non-binding authority. GR 14.1. Such decisions have no precedential value, but may have persuasive value. Crosswhite v. Washington State Dep’t of Soc. & Health Servs., No. 33718-9-III, 2017 WL 169089, at \*1 (Wash. Ct. App. Jan. 17, 2017).

<sup>3</sup> For clarity and to avoid confusion, Danny Wing is referred to by his first name.



sentenced Danny to an exceptional sentence of 416 months on the manslaughter conviction. Slip. op at 2-3. This Court rejected the State's arguments because they were contrary to the law. Slip. op at 9-10. While there were multiple counts, the plea agreement was indivisible because Danny's pleas were made at the same time, in one document, and accepted in a single proceeding. Slip. op. at 9; State v. Bisson, 156 Wn.2d 507, 519, 130 P.3d 820 (2006). As an indivisible multicount agreement, the entire plea agreement must be set aside if there an error as to one count. Slip. op at 9; State v. Turley, 149 Wn.2d 395, 400-01, 69 P.3d 338 (2003). That the misinformation as to the count for assault of a child possibly did not affect Danny's decision to plead guilty was not determinative. Slip. op. at 9-10. This is because Washington courts do "not speculate on the possible outcomes had the defendant been properly advised on the direct consequences of his plea." In re Bradley, 165 Wn.2d 934, 940, 205 P.3d 123 (2009). Thus, this Court reversed and remanded to allow Danny to withdraw his guilty plea. Slip. op at 10.

The analysis is identical in this appeal. Accordingly, the Court should reverse and remand to allow Ms. Wing to withdraw her guilty plea.

#### **D. CONCLUSION**

Because Ms. Wing was misinformed as to the consequences of her plea in violation of due process, this Court should reverse and remand with instruction that Ms. Wing be permitted to withdraw her plea.

The Court should still address the other issues presented in Ms. Wing's primary briefing. If the Court determines that the State breached the plea agreement, Ms. Wing would be entitled to a more expansive remedy. She could either withdraw her guilty plea or enforce the plea agreement. Alternatively, she is at least entitled to an evidentiary hearing on the issue of breach.<sup>4</sup> Concerning the trial court's imposition of discretionary legal financial obligations, the Court should also address that issue because it may recur upon remand.

DATED this 1st day of March, 2017.

Respectfully submitted,

/s Richard W. Lechich  
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Washington Appellate Project  
Attorney for Appellant

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<sup>4</sup> If, after an evidentiary hearing, Ms. Wing is determined to have materially breached the plea agreement, she would still be entitled to withdraw her plea because it was involuntary.

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STATE OF WASHINGTON,	)	
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Respondent,	)	
	)	NO. 48623-7-II
v.	)	
	)	
BRENDA WING,	)	
	)	
Appellant.	)	

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**SIGNED** IN SEATTLE, WASHINGTON THIS 1<sup>ST</sup> DAY OF MARCH, 2017.

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